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CHARLES ELMORE

No. [redacted] 27

IN THE

Supreme Court of the United States

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ILLINOIS LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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INDEX.

	Page
Argument	5–21
I. The survivorship investment fund is a reserve required by the laws of Illinois and, as such, forms the basis of a deduction from gross income under the Revenue Act of 1928	5
II. The survivorship investment insurance issued by the respondent is a modified form of tontine life insurance, an old established and well recognized form of life insurance; the liability of the insurance company thereunder is contingent and the legal reserves required under such policies are life insurance reserves within the meaning of Section 203 of the Revenue Act of 1928	7
III. Neither by the Revenue Act nor by the decision of this court in *Helvering* v. *Inter-Mountain Life Insurance Co.* is the phrase "reserve funds required by law" so limited as to exclude insurance reserves required and set up to cover insurance liabilities which shall accrue upon contingencies other than the contingency of death, such as the liability for endowment and tontine payments, both of which are dependent upon survivorship of a fixed date	17
Conclusion	22
Opinion of the Court below	1
Statement of the Case	1

Summary 3

I. The survivorship investment fund is a reserve required by the laws of Illinois and, as such, forms the basis of a deduction from gross income under the Revenue Act of 1928..... 3

II. The survivorship investment insurance issued by the respondent is a modified form of tontine life insurance, an old established and well recognized form of life insurance..... 3

(a) The liability of an insurance company under tontine policies is contingent and the legal reserves required under such policies are life insurance reserves within the meaning of Section 203 of the Revenue Act of 1928 4

III. Neither by the Revenue Act nor by the decision of this court in *Helvering* v. *Inter-Mountain Life Insurance Co.* is the phrase "reserve funds required by law" so limited as to exclude insurance reserves required and set up to cover insurance liabilities which shall accrue upon contingencies other than the contingency of death, such as the liability for endowment and tontine payments, both of which are dependent upon survivorship of a fixed date..... 4

Table of Cases Cited.

Avery v. Equitable Life Assurance Society, 117 N. Y. 451; 23 N. E. 3 4

Briggs v. McCullough, 36 Calif. 542 ..... 3, 12

Continental Assurance Co. v. U. S. 8 Fed. Supp. 474 (distinguished) 17, 18

Duffy v. Mutual Benefit Co., 272 U. S. 613 20

Endowment etc. Association v. State, 35 Kan. 253 3

Gourley v. Northwestern Nat. Life Ins. Co., 94 Okla. 46; 220 Pac. 645 ..... 3, 8

Helvering v. Inter-Mountain Life Insurance Company, 294 U. S. 686 (distinguished) 17, 18, 19, 20, 21

Hiscock v. Mertens, 205 U. S. 202 ..... 3, 11

Holden v. Stratton, 198 U. S. 202 ..... 3, 9

Minnesota Mutual Life Ins. Co. v. U. S., 66 Ct. Cl. 481 (distinguished) 21

New York Life Ins. Co. v. Edwards, 271 U. S. 109 .. 3, 13, 14

Penn Mutual Life Insurance Co. v. Lederer, 252 U. S. 523 ..... 3, 13, 14

Rothschild v. New York Life Ins. Co., 97 Ill. App. 547 .. 3, 14

Townsend v. Equitable Life Society, 263 Ill. 432 16

Textbooks Cited.

1 Cooley's Briefs on Insurance (2d Ed.) 162 ..... 3, 9

1 Cooley's Briefs on Insurance (2d Ed.) 172 ..... 4, 19

37 Corpus Juris, 363 ..... 3, 7

Statutes Cited.

Illinois 1907 Session Laws, 367 ..... 3, 5-6

Cahill's Illinois Revised Statutes (1929), Chap. 73, Par. 375 ..... 3, 5-6

Federal Revenue Act of 1928, Sec. 203 (a) (2) 3, 6, 17

IN THE

Supreme Court of the United States

No. 903.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ILLINOIS LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION OF THE COURT BELOW.

The decision of the Circuit Court of Appeals for the Seventh Circuit, rendered November 26, 1935, rehearing denied January 9, 1936, is reported in 80 Fed. (2d), page 280, and affirms the opinion of the United States Board of Tax Appeals, reported in 30 B. T. A. 1160.

STATEMENT OF THE CASE.

The statement of the case contained in the petition filed herein is substantially sufficient for the consideration of the questions raised upon such petition excepting for one ap-

parently inadvertent inaccuracy, which we deem it desirable to correct.

In describing the first option available to holders of survivorship investment policies at the expiration of twenty years, it is said at the top of page 4 of the petition that in the event of the insured continuing his policy as a paid-up policy at the end of twenty years, he shall receive "a cash payment of the survivorship investment *then* apportioned to his policy," the word "then" being italicized. The policy (Joint Exhibit A), however, does not contain the word "then," and the apportionment is directed to be made pursuant to the formula contained in the policy when issued.

SUMMARY.

I.

THE SURVIVORSHIP INVESTMENT FUND IS A RESERVE REQUIRED BY THE LAWS OF ILLINOIS AND, AS SUCH, FORMS THE BASIS OF A DEDUCTION FROM GROSS INCOME UNDER THE REVENUE ACT OF 1928.

1907 Illinois Session Laws 367 (Cahill's Illinois Revised Statutes for 1929, also 1935, Chap. 73, Par. 375, Secs. 1 and 5-c).

Revenue Act of 1928, Sec. 203.

II.

THE SURVIVORSHIP INVESTMENT INSURANCE ISSUED BY THE RESPONDENT IS A MODIFIED FORM OF TONTINE LIFE INSURANCE, AN OLD ESTABLISHED AND WELL RECOGNIZED FORM OF LIFE INSURANCE.

Holden v. *Stratton,* 198 U. S. 202.

Hiscock v. *Mertens,* 205 U. S. 202.

New York Life Ins. Co. v. *Edwards,* 271 U. S. 109.

Penn Mutual Co. v. *Lederer,* 252 U. S. 523.

Rothschild v. *New York Life Ins. Co.,* 97 Ill. App. 547.

Gourley v. *Northwestern Nat. Life Ins. Co.,* 94 Okla. 46; 220 Pac. 645.

37 Corpus Juris, 363.

1 Cooley's Briefs on Insurance (2nd Ed.) p. 162.

Briggs v. *McCullough,* 36 Calif. 542.

Endowment etc. Ass'n. v. *State,* 35 Kan. 253.

(a) The liability of an insurance company under tontine policies is contingent and the legal reserves required under such policies are life insurance reserves within the meaning of Section 203 of the Revenue Act of 1928.

Avery v. *Equitable Life Assur. Soc.*, 117 N. Y. 451, 23 N. E. 3.

1 Cooley's Briefs on Insurance (2nd Ed.) p. 172.

III.

NEITHER BY THE REVENUE ACT NOR BY THE DECISION OF THIS COURT IN HELVERING VS. INTER-MOUNTAIN LIFE INSURANCE CO. IS THE PHRASE "RESERVE FUNDS REQUIRED BY LAW" SO LIMITED AS TO EXCLUDE INSURANCE RESERVES REQUIRED AND SET UP TO COVER INSURANCE LIABILITIES WHICH SHALL ACCRUE UPON CONTINGENCIES OTHER THAN THE CONTINGENCY OF DEATH, SUCH AS THE LIABILITY FOR ENDOWMENT AND TONTINE PAYMENTS, BOTH OF WHICH ARE DEPENDENT UPON SURVIVORSHIP OF A FIXED DATE.

See Argument.

ARGUMENT.

I.

THE SURVIVORSHIP INVESTMENT FUND IS A RESERVE REQUIRED BY THE LAWS OF ILLINOIS AND, AS SUCH, FORMS THE BASIS OF A DEDUCTION FROM GROSS INCOME UNDER THE REVENUE ACT OF 1928.

The fundamental questions in the case at bar are whether the reserves involved are required by the law of Illinois, and whether they are insurance reserves as distinguished from solvency reserves. The pertinent Illinois statute in force in the taxable year 1929 is found in the 1907 Illinois Session Laws, page 367 (Cahill's Ill. Rev. Stats., 1929, also 1935, Chap. 73, Par. 375). The applicable provisions are:

> "SEC. 1. That from and after January 1, 1908, no policy of life insurance shall be issued or delivered in this State or be issued by a life insurance company organized under the laws of this State, unless the same shall provide the following:
>
> * * * * * *
>
> (5-c) * * * if any company shall issue any non-participating policy under the terms of which any stipulated part of premiums received is to be placed in a separate fund for subsequent apportionment, such company shall furnish the Department of Trade and Commerce each year a statement showing the number and amount of all such policies in force at the beginning of the year for which the statement is made; of all such policies issued and revived or terminated during the said year with the mode of termination; and the number and amount of all such policies in force at the end of said year. Also a statement showing any and all amounts provisionally set apart, ascertained or calculated or held awaiting apportionment upon such policies according to classes, at the beginning of said year, the additions made to the said fund during the year with the source from which such additions arose, the

deductions made from the said fund (if permitted by the contract) during the year with the reasons therefor and the amount of said fund at the end of the year; *which shall be carried as a distinct and separate reserve liability of the company for the benefit of the classes of policies from the premium payments on which the sum was accumulated.* No part of said fund prior to the time of distribution stipulated in the contract, shall be considered in determining the loan and cash and other surrender values provided for by this Act * * *." [Italics supplied.]

It is not disputed that Paragraph (5-c) of Section 1 applies to precisely the type of policy introduced as Joint Exhibit "A", and that the portions of the premiums allocated to said reserve fund are expressly required to

"be carried as a distinct and separate reserve liability of the company for the benefit of the classes of policies from the premium payments on which the sum was accumulated."

Section 203 (a) (2) of the Revenue Act of 1928 describing the deductible reserves reads:

"An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subsection, of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, plus (in case of life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation) 4 per centum of the mean of such reserve funds (not required by law) held at the beginning and end of the taxable year, as the Commissioner finds to be necessary for the protection of the holders of such policies only."

Petitioner's contention is that although the survivorship investment fund is a reserve required by Illinois law, it is not an *insurance* reserve and therefore furnishes no basis for a deduction.

II.

THE SURVIVORSHIP INVESTMENT INSURANCE ISSUED BY THE RESPONDENT IS A MODIFIED FORM OF TONTINE LIFE INSURANCE, AN OLD ESTABLISHED AND WELL RECOGNIZED FORM OF LIFE INSURANCE; THE LIABILITY OF THE INSURANCE COMPANY THEREUNDER IS CONTINGENT; AND THE LEGAL RESERVES REQUIRED UNDER SUCH POLICIES ARE LIFE INSURANCE RESERVES WITHIN THE MEANING OF SECTION 203 OF THE REVENUE ACT OF 1928.

Although the petitioner goes only so far as to deny the deductibility of the reserve in question for the assigned reason that it is not a "*life insurance*" reserve, the argument must be followed through to its ultimate implication that the reserve is not a life insurance reserve because the survivorship investment benefit is not life insurance—or, better still, is not insurance—for if the tontine benefit is not *life* insurance, what kind of insurance is it?

The most common kinds of life insurance are ordinary life insurance and endowment insurance, in the latter of which the full amount of the insurance proceeds is payable to the insured in the event of his surviving a fixed period of years. There are other kinds of insurance, however, and among them are the tontine and semi-tontine methods of insurance.

An excellent and brief definition, description, and history of tontine insurance are found in 37 Corpus Juris, page 363, where it is said:

> "Tontine insurance is a form of life insurance by which the policyholder agrees, in common with the other policyholders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years called the 'tontine period,' the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force, the beneficiary of an insured who dies within

> the tontine period being entitled only to the insurance provided for by the policy, and not to participation in the profits. This system of insurance is a modification of the original tontine principle, which took its name from Lorenzo Tonti, an Italian of the seventeenth century, who first conceived the idea and put it in practice, and the general idea of which was that money or property was loaned, owned, or invested for the benefit of a number of persons, who at first received its income, the share of a deceased member increasing the sum divisible among the survivors, and the last survivor taking the whole income or principal as the case may be."

Another description of the tontine policy is contained in *Gourley* v. *Northwestern Nat. Life Ins. Co.*, 94 Oklahoma 46, 220 Pac. 645, 646. At page 47 it is said:

> "The distinctive features of a tontine policy are: That the dividends of a certain group of policies shall be collected and placed into a particular fund during a given number of years, and distributed to the policy holders, at the expiration of the time named. The years during which the fund is accumulated is known as the tontine period. Those who die or lapse their policies lose the benefit of the accumulated dividends, which go to the benefit of those who completed the tontine period. *Uhlman* v. *N. Y. Life Ins. Co.*, 109 N. Y. 421, 4 Amer. St. Rep. 482; *Pierce* v. *Equitable Life Ins. Society* (Mass.) 12 N. E. 858."

The modern tontine (or semi-tontine) plan, which involves a combination of regular life insurance as to the return of a specific sum payable upon death, and another sum payable to the insured upon his survivorship of the tontine period, is essentially the same as endowment insurance. In only two respects do they differ: First, under the endowment plan the entire insurance proceeds are payable to the insured upon his surviving a specified date, whereas under the tontine plan only the investment reserve is payable to the insured upon his surviving the specified date, and the remainder of the insurance proceeds is payable to the bene-

ficiary upon the death of the insured. The second difference is that under the endowment plan the amount payable is definitely fixed in advance, whereas under the tontine plan the amount payable is not fixed until the expiration of the period, because it consists of the entire amount of the tontine reserve divided by the number of then surviving members of that tontine class.

In 1 Cooley's Briefs on Insurance (2nd Ed.), 162, endowment policies and tontine policies are grouped together in a single section.

The essential similarity of semi-tontine insurance and ordinary insurance of any other type is manifest upon considering these types from another viewpoint. Under an ordinary life insurance policy a specified amount is payable upon the death of the insured to designated beneficiaries. Under the tontine plan, upon the same event (death of the insured) an amount measured by the contributions of the insured plus accumulations thereon, is added to a fund held for a differently described group of beneficiaries, *i. e.*, for the members of the tontine class who survive the stipulated period. This viewpoint has given rise to the question whether tontine insurance is really insurance or a gambling contract because of an alleged lack of insurable interest of the various class members in one another. The overwhelming weight of authority in this court, Illinois courts, and the courts of the several states is that tontine or semi-tontine policies are insurance contracts and not gambling contracts or some other species of undertaking. Semi-tontine policies like those in the case at bar were involved, and their validity was recognized by this court, in the four cases discussed below.

Holden v. *Stratton*, 198 U. S. 202, was a bankruptcy proceeding involving the question of whether, under Section

70 of the Bankruptcy Act of 1898, the trustee in bankruptcy took title to certain life insurance policies on the life of the bankrupt. One of the policies was on the semi-tontine plan and was described in the statement of facts at page 203 as follows: "The policy for $5,000 was on what was termed the semi-tontine plan. An annual premium of $233.80 was required to be paid for ten years from the date of the previous policy, which had been surrendered, that is, until May 21, 1900, and therefore at the date when the bankrupts contracted the debts set forth in their schedules and at the date of the adjudications in bankruptcy, this period had expired and no further payment of premiums was necessary. Upon the death of the insured the amount of the policy was to be paid to the wife as the beneficiary, or, in the contingency of her prior decease, to the executors, administrators or assigns of the insured. It was provided, however, that upon the completion of the tontine dividend period of twenty years—on May 21, 1910—if the insured was then alive, he or his assigns, if creditors, might surrender the policy and receive its full cash value, or a non-participating policy, payable to the original beneficiary, or if she was not alive, to the executors, administrators or assigns of the insured, or the option was given to keep the policy in force and to withdraw the surplus to the credit of the policy in cash, or use the same to purchase additional insurance."

The bankrupt contended that Section 70 of the Bankruptcy Act did not apply because under the applicable laws of the State of Washington, where he lived, life insurance proceeds were exempt from all liability for debt, and Section 6 of the Bankruptcy Act gave effect to the exemption laws of the several states. The argument made to this court was that the tontine fund was not properly "life insurance" and hence such proceeds were not exempt under the Washington statute, which argument is summarized by

this court at page 209 of its opinion as follows: "The arguments supporting this contention are somewhat involved, but are all embraced in the following propositions: First, life insurance, it is said, in its strictest and technical sense, relates only to a fund realizable by death, and therefore the words 'all life insurance,' in the Washington statute, must be given that restricted meaning, hence the statute is inapplicable to one of the policies which partakes of the nature of an endowment," etc.

Such argument was disposed of at page 210 of this court's opinion where it is said:

> "The error in the argument is manifest. It is not to be doubted that the broad terms of the statute, as ordinarily understood, embraced both of the policies, and it would not be construction but legislation to restrict the meaning of the statute in accord with narrower legislation in other States, because in the judgment of a court it might be deemed equitable to do so."

That the proceeds of the tontine element of an insurance policy is "life insurance" and is not some other species of property is also clearly recognized in another bankruptcy case, *Hiscock* v. *Mertens*, 205 U. S. 202, 213, which also involved conflicting claims of the bankrupt and the trustee in bankruptcy, the latter claiming that the bankrupt should be required to assign the insurance policies to him because of the absence of any express provision for a cash surrender value, whereas the bankrupt contended that the trustee was entitled to no more than the actual cash surrender value under the existing practices of the company, which amount he had tendered to the trustee. The policies in question were described in the master's report incorporated at pages 206-207 of this court's opinion as follows: "None of these express any agreement or provision whereby upon default the company shall pay a 'cash surrender value' to any person. By their terms the assured is excluded from any participation in dividends until the completion

of the tontine period, at which time all surplus and profits derived from such policies are to be divided among the persistent policies of that class then in force. At the expiration of the tontine period the persistent policy holder is given certain options, among them to withdraw in cash the policy's entire share of the assets, that is, the accumulated reserve, the amount of which is stated in each policy, and, in addition, the accumulated surplus apportioned to the policy."

The trustee was anxious to procure the policies because of the augmented value attributable to the tontine element which was not considered in determining the cash surrender value. At page 213 this court said:

> "Manifestly a policy cannot be declared in or out of the law according to its age, nor can anything be deduced from the investment features of tontine policies. Such policies were decided to be covered by the law in *Holden* v. *Stratton*. Whether the law should have included them is not our concern. Whatever may be said against it, it has seemed best to the legislature to encourage the extra endeavor and sacrifice which such policies may represent."

It was similarly argued in the case of *Briggs* v. *McCullough*, 36 Cal. 542, that the endowment proceeds of a ten year endowment policy were not insurance but simply the proceeds of "a covenant by the company, that in consideration of a certain sum deposited by McCullough, the company will pay him at the expiration of ten years, or sooner, if he dies, a certain other stipulated sum." It was also contended that such proceeds were consequently not within the protection of the California Statute which specifically exempted insurance proceeds from attachment. The court said at page 550:

> "The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. * * * It is an un-

> dertaking to pay the stipulated sum if he shall die within a specified term, which is of the very essence of life insurance. The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the meantime, does not divest it of its character of life insurance."

The principal difference between the endowment plan which is universally upheld and the semi-tontine or survivorship investment plan which petitioner now questions is that in the former a fixed sum is payable to the insured in the event of survivorship, whereas, under the latter, the endowment cannot be computed until the expiration of the tontine period, and it may be lost in the event of the death of the insured during such period. The mere fact that the payment of the tontine investment is contingent upon survivorship instead of death does not derogate from its character as insurance, for the same is equally true of the usual endowment which likewise is payable in the event of survivorship.

Semi-tontine policies were involved in an income tax case before this court, *New York Life Ins. Co.* v. *Edwards*, 271 U. S. 109. In that case the insurance company contended, on the supposed authority of *Penn Mutual* v. *Lederer, Collector*, 252 U. S. 523, that the "overpayments" on mutual, level premium, deferred dividend policies should be deducted in determining the premium receipts which formed an element of the gross income in computing the insurance company's net taxable income. As appears at the end of page 115 in the *New York Life Insurance* case, the "deferred dividend" or "distribution" policies provided—"That no dividend or surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force. That surplus or profits derived from such policies on the distribution policy plan as shall not be in force at the date of the completion of their respective dis-

tribution periods, shall be apportioned among such policies as shall complete the distribution periods." Clearly, such deferred dividend policies were semi-tontine policies precisely like the survivorship investment policies now under consideration. In the prior case of *Penn Mutual Co.* v. *Lederer, Collector,* (252 U. S. 523) this court had held that where mutual life insurance "overpayments" had been paid back or credited to the individual policyholders or treated as an abatement of premium of such policyholders, the amount thereof should not be included in the company's income. In the *New York Life Insurance Company* case, 271 U. S. 109, however, this court at page 116 held otherwise with respect to the deferred dividend policies, for the sole reason that, under the policy provisions above quoted, no part of the overpayment was repaid or credited to the policyholder but that

> "the aggregate of all such payments was held for distribution among policyholders alive at the end of the period. The receipts for the year were not really diminished."

In the *Penn Mutual* case, 252 U. S. 523, this court, at the bottom of page 532, couples " 'Deferred Dividend' and other semi-tontine policies." In neither of the above two cases does this court intimate that a semi-tontine policy does not provide for *insurance* or for *life* insurance.

The validity of the tontine type of contract was directly attacked and sustained in Illinois in the case of *Rothschild* v. *New York Life Insurance Co.,* 97 Ill. App. 547. In that case the holder of several policies on the tontine plan (described as "the accumulation plan"—page 549), under which the reserve was distributable upon twenty-years' survivorship, filed a bill at the end of five years to set aside the policies, alleging that he had been misled as to their nature and had just ascertained "that said policies are cunningly devised gaming contracts, etc." (p. 551.) By the

bill, complainant also sought to recover the amount of his contribution to the tontine or accumulation fund. Complainant also relied upon the statutory provision which "requires distribution of surplus at least once in every five years" (p. 555), and also "that a discrimination as to the distribution of the surplus is made in favor of those who survive April 4, 1915, the accumulation period, and against those who may die before that time; that the former are to be regarded as one class and the latter another." The Illinois Appellate Court held the policies not subject to any of the foregoing objections. At page 556 the court says:

> "There is no discrimination against any member. Each member, in so far as surplus is concerned, makes the same contract. It is the same in principal as if each member contracted for a sum certain in the event of his death, plus a certain percentage of such sum, in case he should survive April 4, 1915.
>
> Lastly, it is contended that the effect of the provision as to the accumulation period, April 4, 1915, and the provision that no dividend shall be apportioned or paid before the end of that period, is that each policy holder bets with all the others that he will survive April 4, 1915, and therefore the provisions are in violation of section 131 of chapter 38, Hurd's Rev. Stat. 1899, in respect to gaming contracts. We can not concur in the view that the contracts are wagers or bets within the meaning of section 131. Section 134 of the same chapter is as follows:
>
> 'Nothing contained in sections 131 and 132 above, shall be (so) construed as to prohibit or in any way affect any insurance made in good faith for the security or indemnity of the party insured and which is not otherwise prohibited by law, nor to any contract of bottomry or *respondentia.*'
>
> The averments of the bill do not sustain the view that appellant's contracts of insurance were not made in good faith for his security or indemnity; and, as we have already held, they were not prohibited by law."

Inferentially, the validity of tontine policies was sustained by the Illinois Supreme Court in

Townsend v. *Equitable Life Society*, 263 Ill. 432, in which the court held that a bill for an accounting by a surviving member of the tontine class was not vulnerable to demurrer where it was alleged that the distribution made by the company was not equitable and in accordance with the plan.

At the present time, few, if any, strictly tontine policies are issued because of the non-forfeiture laws of most states forbidding the forfeiture of life insurance policies after two or three years' premiums have been paid. This has brought about a modification of the tontine plan which is now usually coupled with and embodied in an ordinary life insurance policy, the principal proceeds of which are payable upon death. This plan of insurance is known under divers names, such as semi-tontine, survivorship investment policies, investment reserve policies, accumulation reserve policies, etc. The theory underlying the modern tontine policy is set forth in the definition of the word tontine in the Century Dictionary, as follows:

> "This modification of ordinary life insurance has been adopted as optional with the insured for the purpose of countervailing the tendency to burden long lived and persistent policy holders with a large amount of premiums in comparison with those whose lives fall in shortly after obtaining insurance. The effect is to reduce the sum payable on deaths after but few years payment of premiums and to increase the sum payable on deaths occurring after a given number of years."

The tontine element of such semi-tontine life insurance contracts is a feature designed to make the life insurance investment more attractive to the person of exceptionally long lived stock whose actual expectancy can reasonably be presumed to exceed the ordinary expectancy of his age, upon which the premiums are based, and to make the possible investment gain to him upon survivorship commensurate with the excessive cost to him because of the computation of the premium upon such ordinary shorter expectancy.

III.

NEITHER BY THE REVENUE ACT NOR BY THE DECISION OF THIS COURT IN HELVERING VS. INTER-MOUNTAIN LIFE INSURANCE CO. IS THE PHRASE "RESERVE FUNDS REQUIRED BY LAW" SO LIMITED AS TO EXCLUDE INSURANCE RESERVES REQUIRED AND SET UP TO COVER INSURANCE LIABILITIES WHICH SHALL ACCRUE UPON CONTINGENCIES OTHER THAN THE CONTINGENCY OF DEATH, SUCH AS THE LIABILITY FOR ENDOWMENT AND TONTINE PAYMENTS, BOTH OF WHICH ARE DEPENDENT UPON SURVIVORSHIP OF A FIXED DATE.

At the outset it should be observed that Section 203 (a) (2) of the Revenue Act of 1928 (See page 6, *ante*) expressly provides for the deduction of 4 per cent of the mean of reserves other than life insurance reserves—health and accident insurance combined in one policy with a certain type of life insurance.

The Petitioner asks this court to review the decision of the lower court in this case because of an alleged conflict of that decision with a recent decision of this court and two prior decisions of the United States Court of Claims. One of the latter cases is *Continental Assurance Co.* v. *United States,* 8 Fed. Suppl. 474, in which the facts were substantially the same as were involved in the decision of this court in *Helvering* v. *Inter-Mountain Life Insurance Co.* 294 U. S. 686. The facts in those two cases were so widely different from those in the case at bar that there could be no conflict in the decisions. Both cases involved the deductibility of a percentage of reserves required to be set aside to cover the liability upon *matured coupons* which, upon their maturity, had ceased to be contingent liabilities and had become debts immediately payable to the policy holders, or subject to application as the policy holders' funds in the manner specified in their policies. Because the facts of the cases are identical, we shall confine ourselves to comments upon the *Inter-Mountain Life Insurance Company* case, all

of which comments are, however, equally applicable to the *Continental Assurance Co.* case. In the *Inter-Mountain Life Insurance Company* case, the pertinent facts were stated by Mr. Justice Butler at page 688 as follows:

> "The record contains a specimen policy for $10,000 applicable to age 35 issued in consideration of 20 annual premiums of $420.90. Attached are 19 coupons maturing serially on anniversary dates of the policy beginning with the first and ending with the nineteenth. Each coupon is a promise that at its maturity the company will pay the amount specified to the owner of the policy.
>
> The policy states: The company will credit insured the face amount of any matured coupon as it becomes due and pay compound interest thereon, thereby creating a fund to the credit of the insured which may be applied to the payment of premiums or at any time withdrawn in cash; and if not so applied or withdrawn prior to his death, it will pay the coupon values with interest to date of death to the beneficiary in addition to the face amount of the policy."

It will at once be perceived that "each coupon is a promise that at *its* maturity the company will pay the amount specified." This single sentence illustrates the wide divergence of the two cases. In a case involving reserves against matured and unpaid coupons there is a fixed and definite liability *immediately payable* upon the maturity of each coupon. When that day arrives all element of contingency vanishes and the insurance company immediately becomes a debtor in the amount specified. It is true that the insured has certain options even under the coupon plan, but those options only relate to the application which shall be made by the insurance company of the moneys in its hands belonging to the insured. The gist of the decision in the *Inter-Mountain Life Insurance Company* case is that the only reserves properly deductible are those providing for *contingent* liabilities, whereas the liability of the insurance company upon *matured coupons* is not contingent, or as this

court said: "Liability on the matured coupons depends upon no contingency." This is obviously true, and it is equally obvious that the liability of the respondent upon its survivorship investment policies is contingent. The two plans are wholly different. The matured coupons involved in the *Inter-Mountain Insurance Company* case represented actual *immediate* liabilities of the insurance company and debts actually then due and owing from the insurance company to the coupon-holders. The liability of the respondent under the policies here involved is, however, a *future* and *contingent* liability which may or may not at some future date ripen into an indebtedness. We do not have in mind so much the possibility of the policyholder failing to persist in the payment of premiums as we do the contingency of his failure to survive the tontine period.

In 1 Cooley's Briefs on Insurance (2nd Ed., 1927), it is said at page 172:

> "Until the expiration of the tontine period, the liability of the company is contingent (*Avery* v. *Equitable Life Assur. Soc.*, 117 N. Y. 459, 23 N. E. 3). On the expiration of the period, the relation of debtor and creditor arises."

The several cases cited by that author amply support the text. The same author continues at page 172:

> "So, where the insured died a short time before the expiration of the period, his beneficiary was entitled to no share in the tontine fund."

That is, of course, quite different from the liability of the insurance company in the *Inter-Mountain Insurance Company* case, for in that case there was a debtor-creditor relationship immediately upon the maturity of the several coupons and had insured died before payment of any such matured coupon the company would have remained *pro tanto* liable to his estate.

The distinction we have pointed out between the rights of the tontine policyholders in the case at bar and the rights

of the holders of matured coupons in the *Inter-Mountain Life Insurance Company* case is borne out by the language of this court in *Duffy* v. *Mutual Benefit Co.*, 272 U. S. 613. That was a proceeding involving the determination of the insurance company's excess profits tax, the specific question being whether the legal reserves set up by the company constituted "invested capital." The insurance company contended that they did not constitute capital, but represented an existing liability. The Supreme Court held otherwise, however, saying at page 618:

> "These assets, thus constituted, have never represented indebtedness any more than the capital of a stock corporation subscribed by its stockholders represents indebtedness. Until the maturity of a policy, the policyholder is simply a member of the corporation, with no present enforceable right against the assets. Upon the maturity of the policy he becomes a creditor with an enforceable right. Then for the first time there is an indebtedness. See *Mayer* v. *Attorney General*, 32 N. J. Eq. 815, 820-822."

Similarly in the cases we are now considering. In the *Inter-Mountain Life Insurance Company* case the coupons involved had matured so that the policyholders had become creditors and there was an existing indebtedness. In the case at bar, however, the policies had not matured, and prior to the expiration of the tontine period the policyholders had no present enforceable rights against the assets of the company. Whether or not they ever would obtain such rights in the future is involved in the contingency of survivoriship.

It thus appears that the *Inter-Mountain Life Insurance Company* case is in no respect parallel with the case at bar and is valueless as authority under the facts involved in the present case. Inasmuch as petitioner's entire case is founded upon the supposed authority of the *Inter-Mountain Life Insurance Company* decision, petitioner's case is not supported by any authority. On the other hand, the facts

involved take the present case outside the express limitations announced in the rule in the *Inter-Mountain Life Insurance Company* case wherein this court predicated its decision on the fact that the case involved the deductibility of reserves for *matured coupons*. These the court held to be an immediate fixed indebtedness free from any contingency, whereas in the present case there can be no actual liability of the company to pay until the expiration of the tontine period, and even then such liability as to each member of the class is contingent upon survivorship.

As to the other Court of Claims case cited by Petitioner, *Minnesota Mutual Life Insurance Co.* v. *United States*, 66 Ct. Cl. 481, decided in December, 1928, it is sufficient to say that thereafter, on April 1, 1935, this court in *Helvering* v. *Inter-Mountain Life Insurance Co.* 294 U. S. 686, finally and definitely settled the question of the deductibility of insurance reserves. The gist and limits of the doctrine announced by this court are contained in this brief excerpt from the opinion at page 690:

> "The coupon values are the equivalent of cash * * *. Liability on the matured coupons depends upon no contingency."

It is evident to us that this court did not intend to go any farther than indicated above, and did intend to deny deductibility only with respect to reserves for insurance liabilities of a wholly noncontingent character. Inasmuch as no conflict of decisions has developed since this court so positively announced the rule, no ground for review exists.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals for the Seventh Circuit correctly decided the question presented in the Petition for Certiorari, in conformity with the applicable and controlling decisions of this court and the weight of authority generally, and that the said court correctly arrived at each of the following conclusions: That the survivorship investment fund policies employed by the Respondent cover semi-tontine insurance; that semi-tontine insurance is life insurance and not a gambling contract; that the Respondent's liability respecting such investment funds is contingent; that the Illinois statute requires the maintenance of the reserves set up by the Respondent on the said policies; that such reserves are, therefore, life insurance reserves required under the laws of the state and are deductible under Section 203 (a) (2) of the Revenue Act of 1928. We, therefore, respectfully urge that the Petition for Certiorari should be denied.

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